## NEGLIGENCE — SUFFICIENCY OF THE EVIDENCE WHEN INVITEES SLIP AND FALL ON THE PREMISES

Plaintiff, a boy between eleven and twelve years of age, brought an action by his next friend to recover damages for personal injuries sustained while using the diving tower at defendant's swimming pool. The boy had slipped and fallen from the tower, the platform of which was grooved and rough. The planks were painted and became slippery when wet. During a heavy rainstorm the pool guard had warned the bathers and divers not to use the platform until the storm subsided. As soon as the rain ceased, the plaintiff mounted the slippery, wet tower and resumed diving. After diving a few times, the plaintiff, in attempting a back dive, slipped and fell striking his head against the wall of the pool. Plaintiff alleged that his injuries resulted from the negligent acts of the defendant in failing to cover the diving platform with burlap or some abrasive substance, thus permitting the platform to become wet and slippery, and in failing to warn plaintiff of its slippery condition. The Supreme Court held that a verdict was properly directed for the defendant, as the plaintiff had not shown sufficient evidence of negligence to submit the case to the jury.[1]

No other case was found wherein an injury occurred due to one's slipping off a diving board. Numerous cases have dealt with injuries resulting from invitees slipping in swimming pools or in stores, in most of which cases the courts have held that the mere fact of plaintiff's slipping on defendant's property did not make out a case for the jury.

In the leading Ohio case,[2] a customer slipped on entering defendant's store. The floor was wet because water had been tracked in by customers and blown in by the wind. The court held that a verdict should have been directed for the defendant. Recently, an Ohio Court of Appeals rendered a similar decision in a parallel case where the customer slipped on a slushy floor.[3] Other state courts have reached the same result as indicated by like decisions in New York[4] and New Jersey.[5] There has been a similar approach in cases in which the injury has occurred in swimming pools. A New York court dismissed the complaint for want of evidence of negligence in a case in which plaintiff had slipped and fallen on the wet steps leading to a platform in defendant's swimming pool.[6] Where the bathers fell on the wet floor at the edge of the pool, the court said that the slippery condition of the platform surrounding the

[1] *Engelhardt* v. *Philips*, 136 Ohio St. 73, 23 N.E. (2d) 829, 15 Ohio Op. 581 (1939).
[2] *Kresge Co.* v. *Fader*, 116 Ohio St. 718, 158 N.E. 174, 58 A.L.R. 132 (1927).
[3] *Picman* v. *Higbee Co.*, 54 Ohio App. 55, 6 N.E. (2d) 21 (1935).
[4] *McCluley* v. *United Cigar Stores*, 198 N.Y.S. 154, 204 App. Div. 356 (1923); *Miller* v. *Gimbel Bros., Inc.*, 262 N.Y. 107, 186 N.E. 410 (1933).
[5] *Bodine* v. *Goerke*, 102 N.J.L. 642, 133 Atl. 295 (1926).
[6] *Beck* v. *Broad Channel Bathing Park*, 255 N.Y. 641, 175 N.E. 350 (1931).

pool was necessarily incidental to its use, and in the absence of any proof of violation of defendant's duty to keep the premises in a reasonably safe condition, a directed verdict should have been rendered.[7] Similar statements may be found by a Texas court[8] and a Washington court.[9] A Missouri court held that the case had been properly submitted to the jury but reversed the case for error in the instructions.[10]

There is some support for the opposite view. In another Texas case, it was indicated that there was sufficient evidence to submit the case to the jury, but the case was reversed on other grounds.[11] The only evidence offered in that case was plaintiff's testimony that the part of the tile and concrete floor on which plaintiff fell was smooth, slippery, and slimy, whereas other portions had been hacked. Where a restauranteur knew that the floor had been made slippery during the day due to moisture in the air, and as a result plaintiff fell, a federal reviewing court reversed the trial court for error in directing a verdict for defendant.[12]

In cases in which the plaintiff has been injured by slipping and falling on an oily spot,[13] a piece of lettuce,[14] soap,[15] soapy water,[16] or wet waxed linoleum,[17] the courts have refused to impose liability on the defendant for injury to an invitee unless the dangerous condition causing the accident was known to the owner, or unless the defendant in the exercise of reasonable care should have known of the dangerous condition.

In the instant case, the defendant may of course be charged with knowledge that the floor was wet. The structure was exposed to the elements and the platform would frequently be wet as a result of rain. However, even if no rain fell, a platform used repeatedly for diving would not be completely dry. While the precipitation would make the board somewhat more slippery, the decision in the principal case appears reasonable. A diving board cannot be entirely free from moisture and, in the absence of evidence that other materials which would reduce the risk of slipping were available and in common use, it would seem that a verdict was rightly directed for the defendant. At any rate, the cases most nearly analogous indicate a decided preference for that view.

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[7] *Sciarello* v. *Coast Holding Co.*, 274 N.Y.S. 776, 242 App. Div. 802 (1934).
[8] *Crystal Palace Inc.* v. *Lenox*, 299 S.W. 703 (Texas Civil App., 1927).
[9] *Anderson* v. *Seattle Park Co.*, 79 Wash. 575, 140 Pac. 698 (1914).
[10] *Smith* v. *Sears Roebuck & Co.*, 84 S.W. (2d) 414 (Mo. App., 1935).
[11] *Crystal Palace* v. *Roempke*, 227 S.W. 230 (Texas Civil App., 1920).
[12] *Holmes* v. *Ginter Restaurant*, 54 F. (2d) 876 (C.C.A., First Cir.) (1932).
[13] *J. C. Penny* v. *Robison*, 128 Ohio St. 626, 193 N.E. 401, 1 Ohio Op. 299, 100 A.L.R. 705, 16 Ohio L. Abs. 443 (1934).
[14] *Kroger Co.* v. *McCune*, 46 Ohio App. 291, 188 N.E. 10, 39 Ohio L. Rep. 416, 16 Ohio L. Abs. 78 (1933).
[15] *Rom.* v. *Huber*, 94 N.J.L. 258, 109 Atl. 504 (1920).
[16] *Lewis* v. *Reinberg*, 54 Idaho 87, 29 P. (2d) 439 (1934).
[17] *Taylorv. Northern State Power Co.*, 196 Minn. 22 (1935).